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Supreme Court, U.S.
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No. 94 713 OCT 13 1994

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

KENT F. RAY, Petitioner

v.

THE STATE OF CALIFORNIA, Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF
CALIFORNIA, THIRD APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a situation where an officer is told by a third party that petitioner consented to the search of his home, does the officer have the minimal burden of confirming that petitioner actually did consent to such a search as a predicate to a two hour exploratory search of petitioner's home while petitioner remained asleep in an upstairs bedroom?

2. Although evidence that constitute exceptions to the hearsay rule are not generally violative to the Confrontation Clause, is the evidence in this case that spanned three to five levels of hearsay so unreliable that it is repugnant to the Confrontation Clause as its nature effectively makes meaningful cross examination impossible?

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OCTOBER TERM, 1994

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v.

THE STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

Petitioner, KENT F. RAY, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Third Appellate District, filed April 26, 1994, affirming petitioner's conviction for first degree murder in this case.

OPINION BELOW

The unpublished opinion of the Court of Appeal of the State of California, Third Appellate District is reproduced in the Appendix at A1 through A37.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a) on the grounds that his rights under the Fourth, Sixth and Fourteenth Amendments to the U.S. Constitution were violated. The Court of Appeal issued its decision rejecting these claims on April 26, 1994. The California Supreme Court denied review on July 27, 1994.

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

United States Constitution, Fourth Amendment, Sixth Amendment, Fourteenth Amendment; California Evidence Code sections 352 and 1235; and California

Penal Code section 187. See Appendix at A63 for verbatim statement of these authorities.

STATEMENT OF THE CASE

I. Procedural History

On January 30, 1992, the Sacramento County District Attorney filed an Information in Sacramento County Superior Court charging petitioner with violation of California Penal Code section 187, murder. On July 21, 1992, a jury found petitioner guilty of first degree murder following trial. Petitioner appealed.

II. Evidence At Trial

Factually, this charge arose out of the November 3, 1991 disappearance of petitioner's wife, Kwok Ray [hereinafter "Mrs. Ray"]. Petitioner and Mrs. Ray lived in Sacramento, California near Mrs. Ray's sister, Kwok Kin Yuen [hereinafter "Kim"] and other family.

On the morning of November 5, 1991, police officers found Mrs. Ray's body in the trunk of her car. The location was approximately ten minutes by car from petitioner's home. The medical examiner determined that Mrs. Ray had died by strangulation and she had died 55-60 hours before the officers discovered the body.

Shortly before 1:00 a.m. in the morning of November 3, 1991, Kim dropped Mrs. Ray off at petitioner's home after work that evening. Petitioner was home at the time. That was the last time any witness saw Mrs. Ray alive. About 5:30 a.m., a neighbor heard a car start from the direction of petitioner's home. Mrs. Ray's friends and sisters came to the home later that morning because they had planned a trip for that day. While there, they noticed a stain on the carpet of the living room of the home. Later

that day Kim and a friend contacted the police and asked them to come to the house to look at the stain.

An officer came to the house later that evening and Kim allowed him in with her key. The officer examined the stained portion of the carpet and seized fibers from it. The officer then called for an evidence technician and they conducted a two hour search of the house. After the officers completed their search, they knocked on the bedroom door and petitioner answered. Petitioner informed the officers that he did not know the whereabouts of his wife.

The next day officers obtained a search warrant based on the evidence seized during the first search. They seized portions of the carpet during this search. The officers opined that the carpet had been scrubbed in the interim. Subsequent testing detected a minute

amount of blood of a type consistent with Ms. Ray's blood in the carpet and pad.

III. Petitioner's Statement

The prosecutor introduced evidence of a statement made by petitioner several years before the disappearance of Mrs. Ray. Petitioner's girlfriend Jiang Jiang [hereinafter "Jiang"] testified regarding the statement. Petitioner objected to the admission of the statement in limine and the trial court conducted a hearing.

Jiang testified that during her initial interview with a police detective, the detective mentioned that Jiang could be arrested if she did not cooperate. The possibility of such an arrest and the possible deportation to China frightened Jiang, because of the danger of retaliation for her prior political activities in China.

Although she did not recall precisely what she said to the detective

during a later interview, she remembered that she qualified her statement telling the detective that she was stating what her girlfriend had told her she, Jiang, had previously said. (RT 210, 212,222-223, 227.) Indeed, Jiang testified that she did not even recall or believe she had the conversation that her girlfriend told her she had. (RT 228-229, 246.)

The trial court found the statement admissible applying an California Evidence Code section 352 analysis. Additionally, the trial court found that Jiang's statements to the officers were inconsistent with her testimony at the hearing and at trial.

To reiterate for clarity, pursuant to Jiang's testimony on the motion and at trial, the statement represented four levels of hearsay: 1) Jiang said; 2) that her friend said; 3) that Jiang said; 4)

that petitioner said [details of statement]. (See A29-A30.)

IV. Evidence Related To The Motion To Suppress

In limine, petitioner moved to suppress the items seized during both searches of his home. The trial court heard testimony out of the presence of the jury regarding this motion.

Kim testified that she could not find Mrs. Ray on the morning of November 3. As a result, she visited Mr. Ray's house twice that morning trying to locate her sister. After attempting to call the police from Mr. Ray's phone, she went home and met with Elaine Rice. Elaine Rice testified that she got a call from Paula [Kim's other sister] at approximately 2:30 p.m. on November 3, 1991. Because of the call, she drove immediately to petitioner's house arriving at approximately 2:40 p.m. At the house, she spoke to petitioner for

about fifteen minutes, but did not go in. Ms. Rice then went to Paula's house, talked to Paula briefly and both Ms. Rice and Paula returned to Mr. Ray's house. They arrived at Mr. Ray's house at approximately 3:00 p.m. They looked around Mr. Ray's house and Paula pointed out a large stain about the size of a body just inside the entryway to the home.

Kim and Ms. Rice called the police several times to attempt to persuade the police to send an officer to look at the spot in the carpet. Later, they called petitioner to give him the police report number. Because of Kim's difficulty with English, Kim passed the phone to Ms. Rice. Ms. Rice testified that she "explained to [petitioner] I was trying to get the police to come out to the house to look at the stain." (RT 26.) According to Ms. Rice, "He said 'yes.'"

(RT 26.) Petitioner said nothing more than that. (RT 27.) This first call to petitioner took place at approximately 6:00 p.m.

Later that evening, they called petitioner again. Ms. Rice testified that she told petitioner: "The police said they would be out in an hour to look at the carpet. I just wanted to let you know that." (RT 27.) In response, petitioner said only "yes." (RT 27.) This second call took place at approximately 6:30 p.m.

Ms. Rice later called again to inform petitioner that the police were going to be delayed. (RT 28.) During that conversation, Ms. Rice either said "Kim has a key, can we let ourselves in?' or Ms. Rice said "Kim has a key, would you mind letting ourselves in?" (RT 29-30.) Ms. Rice did not remember precisely what she said. In response, Mr. Ray said

"yeah" or "yes." (RT 28, 29, 40, 59.) Ms. Rice also told petitioner they would try not to wake him. This third call took place at approximately 7:50 p.m.

Later, Kim and Ms. Rice went to a corner near petitioner's house and met Officer Skip Buck. At the corner, with Ms. Rice acting as an interpreter for Kim, they told Officer Buck about their problems in locating Mrs. Ray and concerns about the stain on the carpet. Officer Buck testified that Kim and Ms. Rice said: "[they] had apprised [petitioner] that [they] were going to be contacting law enforcement to come to the residence to check on this." Officer Buck understood Kim and Ms. Rice to say that petitioner had told them that it would be "okay" if the police came to look at the carpet. (RT 113-114.) Still, the officer testified that they had not told the officer when and how

many times they had spoken to petitioner that day. Nor did Kim and Ms. Rice say specifically they had obtained permission from petitioner to let the officer into the home.

After the conversation at the corner, Kim, Ms. Rice and Officer Buck went to petitioner's house where Kim opened the door with her key. They did not knock. They went in the house at approximately 8:43 p.m.

At the time he entered petitioner's home, the officer believed Kim had access to the residence, the occupants were aware that he would be arriving there and that he had authority to enter the house. Officer Buck said that he was never directly told of authority, but inferred it from his understanding that the occupants of the house knew he was coming and that he would be let into the house with a key.

(RT 100-105, 126-128, 131.) He was aware that petitioner would be asleep in the house. (RT 132.) Although not told directly, Officer Buck also understood that Kim was petitioner's sister-in-law and the sister of Mrs. Ray. Kim did not live at the house.

The officer looked at the stain on the carpet. He noticed discoloration and removed several fibers from the carpet, because he felt they might have dried blood on them. He also examined the vacuum cleaner in the dining room. The officer removed the vacuum cleaner bag and inspected it. He found the vacuum cleaner bag to be damp. Officer Buck also looked through the laundry area of the house, one of the closets and the garage of the house. At the officer's request, other officers and an evidence technician came to the house.

After approximately two hours, Officer Buck knocked on petitioner's bedroom door. Up to this point, petitioner remained asleep. It took approximately thirty seconds for petitioner to get up to answer his bedroom door. The officer informed petitioner of what had taken place. According to the officer, petitioner responded by saying "uh-huh." The officer then asked him some general questions about Mrs. Ray's disappearance and left. The officer never specifically asked petitioner if he gave his permission to take anything.

The affidavit for the November 4 search alleged probable cause based almost exclusively on the items seized and viewed during the November 3 search of Petitioner's home.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER PETITIONER'S "YES" IN RESPONSE TO BEING INFORMED BY HIS SISTER IN LAW THAT SHE WAS BRINGING THE POLICE TO LOOK AT THE STAIN ON THE CARPET CONSTITUTED "UNEQUIVOCAL" AND "EXPRESS" CONSENT AND IS A SUFFICIENT PREDICATE UNDER THE FOURTH AMENDMENT TO SUPPORT A TWO HOUR SEARCH OF HIS HOME

A. Petitioner's Right To Be Free From Invasions Of His Home

This Court has explained that "(a)t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (Silverman v. United States 365 U.S. 505, 511 (1961).) "(T)he Fourth Amendment has drawn a firm line at the entrance of the house." (Payton v. New York 445 U.S. 573, 590 (1980).) For these reasons, such searches are presumptively illegal in the absence of a warrant, proof of consent or exigency.

(E.g., Steagald v. United States 451 U.S. 204, 211 (1981).)

It is basic that petitioner's silence and failure to affirmatively object cannot establish consent. "To do so would be to justify entry by consent and consent by entry. 'This will not do.' We must not shift the burden from the government -- to prove 'unequivocal and specific' consent -- to the defendant . . . a defendant's failure to object to such entry is not sufficient to establish free and voluntary consent." (United States v. Shaibu 895 F.2d 1291, 1294 (9th Cir. 1990) [citation omitted]; see also Robinson v. State 578 P.2d 141, 143-144 (Alaska 1978).) This Court has held that the burden is on the state to prove that consent was voluntarily given by petitioner. (E.g., Schneckloth v. Bustamonte 412 U.S. 218, 248-249 (1973);

(Bumper v. North Carolina 391 U.S. 543, 548 (1968).)

B. The Trial Court And The Court Of Appeal Confused Consent With Assent

It is basic that "'(c)onsent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. 'Consent' differs very materially from 'assent.' The former implies positive action and always involves submission. The latter means mere passivity or submission, which does include consent.'" (People v. Perez 9 Cal.3d 651, 658-659 (1973) [citations omitted]; see also Latex Construction Company v. Jacksonville Shipyards 442 F.2d 450, 453 (9th Cir. 1971); People v. Brooks 425 N.W.2d 555, 557 (Mich. 1988); O'Donnell v. R.G. Smith Company 528 A.2d 576, 580 (Pa. 1987) [cases finding

response of "okay" inherently ambiguous].)

The trial court and court of appeal found petitioner's "yes" in response to Ms. Rice's announcement that she would be bringing the police to his house constituted "consent." The trial court made that determination without reference to the related, but distinct concept of "assent." The court of appeal mentioned it but baldly rejected the argument. Still, the testimony on the motion at the hearing did not establish an agreement, but only petitioner's assent to Ms. Rice's stated intent to bring the police to his home.

Petitioner never gave Officer Buck consent, nor was he ever asked for it. Kim's representations that petitioner had agreed to the search is an inadequate substitute. In the context of trial rights, this Court has explained:

> "We would assuredly not permit, therefore, evidence seized in violation of the Fourth Amendment to be introduced on the basis of the trial court's mere 'reasonable belief'-derived from statements by unauthorized persons-that defendant has waived his objection." (Illinois v. Rodriguez 497 U.S. 177, 183 (1990).)

This reasoning is analogous to the instant case considering the high public interest in protecting homes from invasions of the state as against the minor societal cost of Officer Buck being required simply to wake and ask petitioner for some clear consent. (See e.g., United States v. Whitfield 939 F.2d 1071, 1074-75 (D.C. Cir. 1991); People v. Roman 227 Cal.App.3d 674 (1991) [discussing officer's duty to inquire with third party consent].) Petitioner submits that under any reasonable cost/benefit analysis of the application of the exclusionary rule, the burden of clarifying the purported consent by

simply asking petitioner who was present, but asleep, was profoundly outweighed by the invasion by the police into petitioner's home.

The state could not meet its burden on this issue on these facts. The only time that petitioner spoke directly to Officer Buck was when he said "uh-huh" following the officer waking petitioner and informing him that they just completed a two hour search of his home and were taking various items. As such, the evidence did not establish a direct waiver by petitioner of his right to be free of the warrantless intrusion by Officer Buck. Thus, under this Court's analysis in Rodriguez and considering applicable policy considerations, the trial court erred in finding petitioner expressly consented to the search.

C. The Court Of Appeal's Analysis Is Constitutionally Flawed

With only a passing reference to the authority discussed above, the Court of Appeal finds that Kim specifically asked petitioner "can we let ourselves in?" According to the Court of Appeal, petitioner's answer "'yes', could not be more unequivocal." (See A23.) The Court of Appeal's bare reasoning in this context is flawed for several reasons. First, the Court of Appeal fails to even mention the context of this "yes." More importantly, the Court of Appeal does not even address the issue of how "express" consent can be conveyed to Officer Buck from Kim through the interpreter and made only vaguely clear to the officer. This Court has repeatedly recognized that protection of one's home from the state's invasion is at the heart of the Fourth Amendment. To avoid the circumvention of the Fourth Amendment's protection of

one's home by vague "consent" through third parties literally unlocking the door for the state, this Court should intervene by granting this writ and establishing that more is needed than took place here to establish consent for an extended police invasion of one's home.

D. This Case Also Presents Two Important Sub-Issues

If this Court addresses the issue described above, this Court would then have the opportunity to address the scope and third party consent issues that were also addressed in the lower courts. (See People v. Borango 232 Cal.App.3d 378, 387-393 (1991) [survey of cases on scope of consent] & (Illinois v. Rodriguez, supra [case setting guidelines for "apparent consent" cases].) Thus, this Court could use this case as a vehicle to address several very important and

complex aspects of the application of the Fourth Amendment.

II

THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE STATEMENT ADMITTED INTO EVIDENCE ENCOMPASSING MULTIPLE LAYERS OF HEARSAY EFFECTIVELY DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO CONFRONTATION

The admission of this evidence denied petitioner his right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution. California Evidence Code section 1235 allows a prior inconsistent statement to be used as substantive evidence. Petitioner acknowledges that section 1235 has been upheld when generically challenged as violative of the constitutional right to confrontation. (See California v. Green 399 U.S. 149 (1970).) However, in the particular circumstances of the statement at issue in this case, admission of the statement denied petitioner the right to confrontation. Unlike the circumstances of Green, in this case, Jiang did not

acknowledge the statement. (Cf., 399 U.S. at p. 164.) Because of the nature of the evidence that presented the statement to the jury, in these circumstances, petitioner's alleged statement could not be reasonably characterized as having sufficient indicia of reliability to justify its admission through Jiang's inconsistent testimony. (See Ohio v. Roberts 448 U.S. 56, 66 (1979).)

The policy considerations underlying the hearsay rule and confrontation clause frequently overlap and are very similar. Still, "the two are not coterminous; a statement otherwise admissible under the hearsay rule may be prohibited from introduction into evidence by the confrontation clause." (People v. Jones 155 Cal.App.3d 653, 663 (1984).) Specifically, with regard to prior inconsistent statements,

this Court has found that, in the context of inconsistent preliminary hearing testimony, that examination at trial provides "trier of fact a satisfactory basis for evaluating the truth of the prior statement." (California v. Green, supra, 399 U.S. at p. 161.) In Green, this court's reasoning rested on the assumption of "meaningful" trial confrontation to provide 'most of the lost protections [of contemporaneous cross-examination such as oath, observance of demeanor and cross-examination]." (People v. Simmons 123 Cal.App.3d 677, 681 (1981) quoting 399 U.S. at p. 158 [brackets in Simmons].) Thus, even in circumstances where a witness testifies and others that heard the prior statement testify, the confrontation clause can be violated where "meaningful" cross examination is impossible.

For example, an amnesiac witness who testifies that he does not remember cannot be meaningfully cross examined. (People v. Simmons, supra, 123 Cal.App.3d at pp. 681-682.) Similarly, the Court of Appeal held that a prior statement cannot be used in the event of a witness that simply refuses to answer questions or "stonewalls" with no claim of privilege. (People v. Rios 163 Cal.App.3d 852 (1985).) The Rios court reasoned that cross examination is meaningless and violative of the right to confrontation despite the witness' appearance under oath.

This reasoning is directly applicable to the case at bar. Although Jiang and the detective testified, petitioner was deprived of any meaningful cross-examination in this case. Jiang never varied from her testimony that she did not remember petitioner making the

purported statement and insisted that she told the detective that she did not remember, but was simply reminded of the statement by her friend. Despite the Court of Appeal's contrary conclusion, Jiang's testimony was materially the equivalent of the "stonewalling" in Rios. Thus, petitioner could not cross-examine Jiang on the details of what petitioner purportedly said. Under the unusual circumstances of this case, the only person that could be meaningfully cross-examined on petitioner's purported statement would have been Jiang's friend and she did not testify.

Jiang made her statements under the stress of a police interrogation and the benefit of cross examination or even making the statement under oath was absent. There was no inherent trustworthiness in the interview statements.

Because this form of error so totally undermines a defendant's right to confrontation and there is little guidance for the courts of this country on the proper approach to this common evidentiary situation, it is a very important issue of law deserving this Court's attention.

CONCLUSION

For the reasons set out above, petitioner respectfully requests that this petition be granted and this Court address those important issues of law.

DATED: October 10, 1994

Respectfully submitted,

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APPENDIX

Unreported Decision Dated April 26, 1994 Of The California Court Of Appeal, Third Appellate District In *People of The State Of California*, Plaintiff and Respondent v. *Kent F. Ray*, Defendant and Appellant, 3 Crim. C014582

A jury convicted defendant of murder in the first degree. (Pen. Code, §§ 187, 198.) Defendant was sentenced to prison for 25 years to life.

On appeal, defendant contends, principally, that there is no substantial evidence to support his murder conviction or, at the least, no substantial evidence to support a finding of premeditation and deliberation. Additionally, defendant contends the trial court erred (a) in denying his motion to suppress evidence (Pen. Code, § 1538.5), (b) in allowing the impeachment of defendant's girlfriend with prior inconsistent statements, and (c) in refusing defendant's requested instructions. None of defendant's arguments has merit. We shall affirm.

On the morning on November 5, 1991, the victim, Kwok Chi Ray, was found dead, lying

face down in the trunk of her automobile. The victim had a laceration on the right side of her head. This injury was the result of a blow from a blunt instrument. The head laceration would have bled profusely. Such a blow could have rendered the victim unconscious. However, the cause of death was ligature strangulation with an instrument such as a rope. Marks on the victim's neck indicated constant pressure had been applied and death would have occurred in 3-5 minutes. According to medical testimony, the victim died 55-60 hours before her body was discovered, placing her death at sometime between 11 p.m. on Saturday, November 2, and 4 a.m. Sunday, November 3. No murder weapon was found.

The victim and her sisters Paula and Kwok Kin (Kim) all resided in close proximity to each other in the Land Park area of Sacramento. Kim was a daily visitor to the victim's house ("the residence"). Every

morning Kim went to the residence for breakfast and Kim often took naps there in the afternoon. Kim had a key to the residence which she used on a regular basis.

At the time of her death, the victim had been married to defendant for 12 years. In 1986 they had a son, Nelson. The victim and defendant were part owners of a local restaurant. The other owners were Kim and Kim's husband, Michael. The victim and Kim worked at the restaurant as waitresses. Michael worked as a cook and defendant was responsible for maintenance and housekeeping.

It was no secret to family members and close friends that the victim and defendant were having marital problems. Defendant had begun a romantic relationship with Jiang Jiang, a student he met at California State University, Sacramento. The victim was aware of the affair. Three months before the victim's death, defendant filed for divorce. The victim did not want a divorce because she

did not want another woman raising Nelson. Despite their marital problems, the victim and defendant continued to live together in the residence.

If defendant had followed his regular schedule he would have gone to the restaurant on Sunday, November 3, to steam-clean the oven. However, on the afternoon of Saturday, November 2, the victim and defendant argued, apparently because defendant refused any longer to perform his responsibilities at the restaurant.

Following the argument, the victim went to work at the restaurant. During that evening the victim, Kim, and another waitress, Mei Wong, made plans to meet at the residence at 10 o'clock the next morning to take a trip to San Francisco.

Because of the their plans to go to San Francisco, the victim and Kim remained after the restaurant closed at 11 p.m. to clean up.

Among the tasks they performed was steam-cleaning the oven.

Shortly after 1 a.m. on November 3, Kim drove the victim home and watched as she entered the residence and closed the door. Kim did not observe the victim's car, but this was not unusual as it was usually kept in the garage.

Later that morning, at about 5:30, Dinah Fong, a neighbor of defendant and the victim, was awake in bed when she heard the sound of a car motor starting. According to Fong, the sound was not very loud and appeared to come from the direction of the residence. Fong was certain the sound she heard was not that of defendant's truck.

On the morning of November 3, sometime between 9:15 and 9:30, Kim telephoned the residence to inform the victim she had changed her mind about going to San Francisco. Defendant answered and told Kim the victim was not at home; that she was probably at the

restaurant steam-cleaning the oven. When Kim informed the defendant they had steam-cleaned the oven the night before defendant became angry. Kim then asked defendant what time the victim left the residence that morning. Defendant answered he did not know. Kim then called her father and Paula, but was unable to locate the victim.

As the morning progressed, Kim and Paula became worried because they could not find the victim. Kim was especially worried because she always knew where the victim was and what she was doing. Kim went to the victim's house and questioned defendant as to her sister's whereabouts. Defendant again replied he knew nothing. Nelson informed Kim that he had not seen his mother at all that day. According to Kim, defendant did not appear concerned about his wife's appearance.

Brenda Yuen, who earlier that morning had left her two children at the residence wo play with Nelson, returned to the residence

around noon. At that time, Brenda's oldest son told her and Kim that there was a large wet spot on the carpet and pointed it out to them.

Kim and Brenda observed a large stain which was lighter in color that the rest of the carpet. The area was wet and smelled of chlorine and bleach. Kim showed the carpet to defendant, who stated he did not know what had happened. Defendant denied he had cleaned the carpet, and also denied the carpet had been in that condition the previous day. Nelson informed Kim the carpet had not been in that condition the day before. Defendant suggested the kids might have spilled something on the carpet, but the children denied they had spilled anything.

At approximately 2:00 p.m. Kim decided to phone the police. Because she was nervous and did not speak English well, Kim asked defendant to speak to the officer. Defendant did so, then informed Kim the police could not

do anything until the victim had been missing for a longer time.

Later that afternoon, Elaine Rice, an acquaintance of defendant, the victim and Kim, went to the residence and spoke with defendant. Defendant told Rice that he and Nelson awakened at 6:30 that morning and his wife was not at home. According to Rice, defendant did not appear distressed or concerned.

Rice left the residence but returned a short time later along with Paula to look at the carpet. Rice described the stain as a "sizable area about the size of a body that was lighter that the rest of the carpet . . ." Rice inquired of defendant about the condition of the carpet. Defendant repeated what he had said earlier to Kim: he did not know anything about the stain except that it was not there the night before. According to Rice, defendant appeared emotionless and indifferent. Rice and Paula discovered one of

the victim's purses in the pantry but noticed the victim's car was not in the garage.

Paula and Rice left a few minutes later, but Kim and Rice returned after Rice discovered she had left her sunglasses at the residence. Upon arriving, no one was home, so Kim used her own key to enter the residence.

Defendant drove up in his truck with Nelson. It was approximately 4:30 p.m. Kim told defendant that she and Rice were going to file a report with the police.

Rice later spoke on the phone with a police officer and reported the victim's disappearance and requested an officer be sent out to examine the carpet. The officer stated no one could be sent out at that time. As the afternoon turned into evening, Rice and Kim made several additional calls to the police in an effort to have an officer examine the carpet.

Rice and Kim phoned defendant and informed him of their conversations with the

police. In all, they spoke with defendant by phone three times, asking him each time if the police could come to the residence to examine the carpet. Defendant responded affirmatively each time but informed them he intended to go to be at 9 p.m. and further intended to unplug the telephone because it had been ringing all day. Rice informed defendant the police would probably not arrive before he went to bed. Rice suggested that as Kim had a key, Rice and Kim would simply let the police inside when they arrived. Defendant agreed.

Officer Skip Buck arrived at the residence at approximately 8:45 p.m. Rice and Kim informed Buck of everything they had learned, including the unusual condition of the carpet. As they approached the front door, it appeared no one was awake. Kim used her key to let the officer and Rice inside.

Once inside the women showed Buck the carpet. Buck observed part of the carpet was blanched a stark white in contrast to the off-

white color of the rest of the carpet. On closer inspection, Buck observed some darkened areas of red-brown discoloration. The area was wet and smelled of bleach. Buck noticed a vacuum cleaner in the adjacent dining room/play area. The vacuum bag was damp and also smelled of bleach. Buck called for a crime scene investigator to come to the house. Officer Tomita arrived and took photographs of the stained area.

Buck remained in the house for over two hours, at one point removing fibers from the discolored area on the stained carpet. Buck also seized the vacuum cleaner bag.

Before leaving the residence, Buck went to defendant's bedroom door and knocked. Defendant answered. According to Buck, defendant stated he had no clue as to his wife's whereabouts, as the last time he saw her was 4:30 p.m. the preceding day. When defendant awoke at approximately 6:30 the next morning, his wife was not at home. Defendant

had no explanation for the darkened spots within the bleached area of the carpet, but suggested the carpet might have been bleached by chlorine from the pool and Jacuzzi. Defendant repeated the carpet had not been stained when he had gone to bed the previous evening.

Police investigators contacted defendant at his place of work on the following morning, November 4, 1991. Defendant told the officers he was unsure if his wife had come home Sunday morning. Defendant surmised his wife probably did come home but awakened early and left before defendant awoke. He also acknowledged he and the victim had argued about his duties at the restaurant.

During the discussion, the officers sought to obtain from defendant a photo of his wife so that the media could alert the public to her disappearance. The officers indicated their request was urgent. Defendant stated he

could not get away from work until later that afternoon. However, when the officers offered to speak with defendant's supervisor, defendant agreed to leave with the officers and return to his house to obtain a photo.

Upon arriving at the residence, defendant refused to allow the officers to enter and refused to sign a consent form. Defendant entered and obtained a photograph of the victim and gave it to the officers.

On the evening of November 4, the investigating officers obtained a search warrant for the residence. Additional photographs were taken by officer Tomita and a large section of the carpet and pad underneath were cut out by criminalists Mary Hansen and Cheryl Reynolds. Prior to executing the search warrant, Hansen examined the carpet fibers seized by Buck the night before. Hansen concluded there was blood on the fibers. At the residence, investigators observed corresponding stains on the carpet

pad and the underlying cement slab. Tomita also observed that when he returned to the residence that evening, the stain appeared slightly different than it had the night before.[1/]

At approximately 10:50 the following morning, November 5, Officer Smith was on patrol in Oak Park approximately three and one-half miles from the residence. He spotted the victim's blue Ford Taurus parked in front of a no parking sign near the intersection of 38th Street and 9th Avenue. The victim's body was discovered in the trunk. The body was lying face down, with the hands tied behind the back. The keys were not in the car but it contained no currency. Residents of the area

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[1/] Tomita testified that when he entered the residence on the evening of November 4, "the stained area . . . appeared to be of a lighter contrast as if it had been worked on." When asked by the prosecutor what he meant by "worked on," Tomita replied, "It appeared to me as soon as I walked in the door that the area that had been scrubbed or rubbed on had gotten larger."

testified they had observed the car parked in that location as early as Sunday morning, November 3.

Following the discovery of the victim's body and vehicle, defendant was arrested. While defendant was being booked, Detective Stanfield observed three scratches on defendant's right wrist. These appeared to Stanfield to be fingernail scratches. Defendant explained the scratches were a nervous rash.

Criminalist Hansen testified the carpet fibers and the stains on the carpet and carpet pad each contained type B blood. The victim had type B blood. Defendant's blood is type A. Enzyme tests of the blood on the carpet and carpet pad were consistent with tests of the victim's blood.

On November 15, 1991, defendant's girlfriend, Jiang Jiang, was interviewed by Detective Tom Lee in the presence of Jiang's attorney. Jiang related a recent conversation

she had with a friend, Irene Wang. Wang had reminded Jiang that Jiang had previously told her that defendant had stated to Jiang that he wanted his wife killed and had described an occasion two to three years earlier when he had driven to an undisclosed location to meet someone who offered to kill defendant's wife. Defendant had explained that he became scared and never actually met with the prospective killer. Wang reminded Jiang of these statement of defendant several times, beginning shortly after the discovery of the victim's body.

I

Defendant first argues there is no substantial evidence he committed the murder. Additionally, defendant argues there is no substantial evidence the murder was deliberated and premeditated.

The test on appeal is whether substantial evidence supports the conclusion of the trier of fact. (*People* v. *Wright*

(1985) 39 Cal.3d 576, 592.) In making this determination, we must review the whole record in the light most favorable to the judgment and presume in support thereof the existence of every fact the trier could reasonable deduce from the evidence. (*People* v. *Towler* (1982) 31 Cal.3d 105, 117-118; *People* v. *Johnson* (1980) 26 Cal.3d 557, 576-577.)

The standard of review remains the same in cases where the People rely primarily on circumstantial evidence. (*People* v. *Perez* (1992) 2 Cal.4th 1117, 1124.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations] , it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might

also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]" (*People* v. *Bean* (1988) 46 Cal.3d 919, 932-933; *People* v. *Perez*, *supra*, 2 Cal.4th at p. 1124.)

There is no question the victim was murdered by someone. The question is who. As we view the record, a reasonable jury could conclude the evidence establishes defendant's guilt beyond a reasonable doubt.

The most compelling evidence is the carpet which was stained with blood indistinguishable from that of the victim. This evidence suggests the victim was murdered at home. When Kim dropped the victim off at the residence at 1 o'clock on the morning of November 3, only defendant and Nelson were there. Certainly, there is no evidence, direct or circumstantial, that the victim encountered an intruder inside the residence. There was no evidence of forced entry. Moreover there was no evidence the victim had

any enemies who might have entered and lain in wait for her at the residence. The time of death was between 1-4 a.m. on November 3. The only individuals in the residence when the victim was murdered were defendant and Nelson, who at age 5 is not a viable candidate for matricide. Thus the evidence strongly points to defendant as the only person who had the opportunity to kill the victim when she returned home on the morning of November 3.

The carpet stain points to defendant as the killer for a second reason. The medical testimony established the blow to the victim's head would have caused profuse bleeding. It is a reasonable inference the blow to the victim's head was administered in the residence and blood therefrom spilled on the carpet; the carpet the killer attempted to clean up the blood by applying bleach to and then vacuuming the carpet. It is not reasonably plausible that an intruder who attacked the victim in her home would have

made any attempt to clean the blood from the carpet. It is even less plausible to suppose an intruder would have vacuumed the carpet while defendant and Nelson were asleep in the bedroom. The evidence points to defendant as the only possible killer with the motive to cover up the evidence of a murder.

The cause of death also points to the defendant as the killer. The manner of the killing, a blow to the head to stun the victim or to render her unconscious, followed by ligature strangulation for 3-5 minutes, suggests the crime was committed by one with strong hands. He also had marks on his wrist which appeared to an officer to be fingernail scratches.

Defendant's conduct following his wife's disappearance supports the inference he was the killer. Various witnesses described defendant as indifferent, almost casual, in his reaction to his wife's apparent disappearance. Moreover, he was uncooperative

with investigating officers, responding only grudgingly to their request for a photograph of his wife. On this occasion defendant asserted he was too busy to help and only cooperated when the officers offered to speak with his employer.

Defendant's statements following his wife's disappearance are also circumstantially inculpatory. Defendant repeatedly stated to friends, relatives and law enforcement officials the carpet had not been stained when he went to bed the evening of November 2. Defendant was unable to offer a plausible explanation for how the carpet might have become stained while he was asleep in the house. He first suggested that the children had spilled something on the carpet, but the children denied it and there was no evidence they were playing with bleach on the morning of November 3. Defendant then suggested the carpet might have become stained with bleach from the outside pool or Jacuzzi. Yet, there

was no evidence anyone had used the pool or Jacuzzi that morning. Finally, when asked if he could offer any explanation for his wife's disappearance other than that she might have returned to the restaurant, defendant suggested that his wife might have driven to Paradise to retrieve some of her personal possessions. Yet uncontroverted evidence indicated the victim did not like to drive, seldom drove her own vehicle--Kim often drove the victim's vehicle for her--and seldom if ever drove on the freeway.

Defendant had a motive for killing his wife. He had been having an affair with Jiang for some time and had talked with her about getting married and in fact did so two months after his wife's murder. He had made some statements to Jiang about a previous effort to have his wife killed.

In his opening brief, defendant makes numerous concessions with regard to the evidence against him. He argues, however, the

People failed to prove directly or by reasonable inference the date of the carpet stain or any connection between the carpet stain and the victim's death. We disagree.

Defendant's assertion the People failed to prove the date of the stain is belied by his own repeated statements to several people, including the police, that the carpet was not stained when he went to bed on the evening of November 2. Defendant later suggested the children might have spilled something or that the stain came from chlorine used in the outdoor pool and/or Jacuzzi. Yet the children denied spilling anything on the carpet, and there is nothing in the record to suggest anyone had brought bleach or chlorine into the house on the morning of November 3.

Defendant's claim the People failed to prove any nexus between the carpet stain and the victim's death is likewise bootless. The medical testimony established the blow which lacerated the victim's head would have caused

sustained." (*People* v. *Werner* (1952) 111 Cal.App.2d 264, 270.) "No rule can be laid down as to the character or amount of proof necessary to show deliberation and premeditation, and each case must depend upon its own facts. [Citations.] The required deliberation and premeditation need not be directly shown by the evidence but may be inferred from facts and circumstances which furnish a reasonable foundation for such a conclusion. [Citations.]" (*Id.*, at p. 271.)

To generalize, there are three types of evidence from which an inference of premeditation and deliberation may be drawn: (1) facts showing the defendant engaged in planning activity before the killing; (2) proof of defendant's prior conduct with the victim from which the jury might infer a motive for a planned killing; and, (3) evidence the manner of the killing was so particular and exacting the jury could conclude it was carried out according to a

preconceived design and for a specific reason. (*People* v. *Anderson* (1968) 70 Cal.2d 15, 26-27.)

In this case there is substantial evidence of all three of the *Anderson* factors. Prior threats by the killer to do violence to the victim tend to show premeditation and deliberation. (See *United States* v. *Brown* (7th Cir. 1975) 518 F.2d 821, 828.) Here defendant discussed marital problems with Jiang, told her he wanted to have his wife killed, and described steps he once took in an abortive effort to accomplish that end. This evidence tends to show premeditation and deliberation.

From evidence of the victim's daily work routine at the restaurant, her responsibilities as a wife and a mother, and her cultural obligation to assist and help other family members, it may be inferred there was seldom a time when defendant, Nelson, or members of the victim's extended family were

not either with her or did not know where she was and what she was doing. The fact the murder was committed in the early morning hours indicates defendant planned the crime for the only time when there would be an opportunity to kill the victim and dispose of the body. (Cf. *People* v. *Werner*, *supra*, 111 Cal.App.2d at p. 271 ["The mere fact that no eyewitnesses saw the killing or heard the defendant say what was in his mind at the time in question does not necessarily preclude a finding of deliberation and premeditation."].)

Evidence of planning activity may also be inferred from the fact defendant claimed he had an "argument" with the victim on the day before she was killed ostensibly over his refusal any longer to discharge his maintenance responsibilities at the restaurant. His refusal would require the victim to perform those duties in defendant's stead, going to the restaurant Sunday morning to do which included steam-cleaning the oven.

This allowed defendant to claim his wife must have returned to the restaurant early Sunday before he awoke, and thus to plant the inference she met her demise at or enroute to or from the restaurant.

The "argument" would have provided defendant with a plausible explanation for his wife's absence from home when he awoke Sunday morning had not his wife and Kim unexpectedly made plans to go to San Francisco that morning, thus causing them to remain after Saturday night closing to clean the restaurant. When on Sunday morning defendant was informed by Kim that she and the victim had done the steam-cleaning the previous evening, he reacted angrily. The jury could reasonably infer defendant became angry because this unforeseen circumstance had shifted the suspected locus of the murder from the restaurant and environs to the residence.

There is an abundance of substantial evidence of motive. Defendant and the victim

were having marital problems. Defendant and Jiang had discussed getting married several months before the victim was murdered. Although defendant filed an action to dissolve the marriage, the victim did not want a dissolution, as she was concerned about custody of their son. There was also complicated financial arrangements relating to the business which would have to be resolved in the dissolution proceedings. Defendant was the beneficiary of a $70,000 policy of life insurance on his wife. Defendant benefitted financially from the death of the victim and her death also removed all immediate impediments to his marrying Jiang, which he did two months after his wife's murder.

Finally, the manner of the killing was such that the jury could infer it was carried out according to a preconceived design and for calculated reasons. It appears the victim was strangled after she had been struck on the head with force sufficient to have caused her

to lose consciousness. The manner of death--a blow to the head to incapacitate the victim followed by strangulation--suggests evidence of planning activity. (*People* v. *Werner*, *supra*, 111 Cal.App.2d at p. 272.) Moreover, it appears defendant chose a method which would not disturb the sleep of his son, yet one which his strength enabled him easily to accomplish.

"As we have stated, the relevant question on appeal is not whether we are convinced beyond a reasonable doubt, but whether *any* rational trier of fact could have been persuaded beyond a reasonable doubt that defendant premeditated a murder." (Italics in original; *People* v. *Perez*, *supra*, 2 Cal.4th at p. 1127.) Because there is substantial evidence of each of the *Anderson* factors, we conclude the evidence is sufficient to sustain the jury's finding of premeditation and deliberation.

II

Defendant argues the judgment must be reversed because the trial court erroneously denied his motion to suppress. (Pen. Code, § 1538.5.) Defendant makes numerous claims in this regard but, as we shall explain, the dispositive issues are defendant's consent to the search of his residence on November 3, and police adherence to the scope of that consent.

When a search is conducted without a warrant it must be justified under a recognized exception to the warrant requirement. Consent constitutes such an exception. (*People* v. *James* (1977) 10 Cal.3d 99, 106.) The People have the burden of establishing the consent upon which the search was predicated was voluntarily give. (*Ibid.*; *People* v. *Hernandez* (1988) 199 Cal.App.3d 1182, 1187.)

The voluntariness of consent is in every case a question for the trier of fact and must be determined by the totality of circumstances. (*People* v. *James*, *supra*, 19

Cal.3d at pp. 106-107.) On appeal, a reviewing court examines the evidence in the light most favorable to the trial court's finding of voluntariness. (*People* v. *Ratliff* (1986) 41 Cal.3d 675, 686.) The trial court's findings, either express or implied, will be upheld on appeal if they are supported by substantial evidence. (*Ibid.*; *People* v. *James*, supra, 19 Cal.3d at p. 107.)

The evidence at the special hearing shows that throughout the day of Sunday, November 3, many of the victim's relatives and friends were concerned for her safety. One friend, Elaine Rice, acted as an interpreter and liaison for Kim, who did not speak English well, in alerting the police to the victim's disappearance and getting the police to come to the residence to examine the carpet.

Rice testified that on the afternoon of November 3, she telephoned the police and reported the victim missing. Rice called back a second time to report the license plate of

the victim's vehicle. In both conversations, Rice requested an officer be sent out to examine the carpet.

Thereafter, Rice telephoned defendant and related her conversation with the police to him. In particular, Rice informed defendant that she and Kim had asked the police to come to the residence to look at the stain. Defendant responded "yes." Rice later telephoned the police again, asking specifically when an officer might be able to come out to look at the stain. She was informed by the police that they were busy and that it might be some time before an officer could be dispatched to the residence. However, the police did promise an officer would come out that evening. Rice again telephoned defendant and told him the police would be coming out to the house sometime that evening to look at the stain. Defendant again answered "yes."

Later that evening the police contacted Rice and informed her they would be delayed once again. Because defendant had previously informed Rice he intended to unplug the telephone and go to bed at 9 p.m., Rice was concerned about police access to the residence. Rice phoned defendant and told him the police would be delayed. She also asked if she and Kim could let the police into the residence with Kim's house key because defendant would most likely be asleep by the time the police arrived. In response to Rice's request "can we let ourselves in?'" defendant answered "yes."[2/] Rice informed

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[2/] At one point, Rice testified she could not remember if she asked the defendant "Can we let ourselves in?" or something to the effect of "Do you mind if we let ourselves in?" However, on cross-examination, defense counsel questioned Rice specifically on this issue, asking her whether she said to the defendant "'Can we let ourselves in?'" Rice answered in the affirmative. She then testified defendant's answer to that question was "'Yes.'"

defendant that they would do their best not to awaken him.

At approximately 8:45 that evening Officer Buck contacted Rice and Kim who informed him the victim had last been seen at approximately 1 o'clock that morning, and the carpet in the house had a suspicious looking stain. The women also informed Buck that defendant had a Chinese girlfriend "who needed to be married soon in order to secure residency." Finally, the woman informed Buck that Kim had a key to the house, that Rice had spoken with defendant who said it was alright for them to enter, and that defendant might already be asleep. Buck, Kim and Rice then went to the residence where Kim let them in with her key. Defendant was apparently in bed asleep. Once inside the women showed Buck the wet and stained carpet.

Defendant argues his affirmative responses to Rice's twice repeated question that she had asked the police to come over to

examine the carpet are ambiguous, and that at most it shows the defendant may have given his *assent*, but did not *consent*, to allowing the police to enter his house. As we have noted, the question of consent must be decided on the totality of the circumstances. Here, in three separate conversations with Rice, defendant acknowledged Rice's desire to have the police look at the carpet and on each occasion defendant acquiesced in Rice's request. There was no evidence that defendant at any time raised any objection to the police entering his home and examining the carpet.

During the final conversation, aware that the police would probably not arrive until after defendant went to bed, Rice asked defendant, "can we let ourselves in?" Defendant's answer, "yes," could not be more unequivocal. The trial court's finding defendant expressly consented to police entry to his home is clearly supported by substantial evidence.

Defendant next argues that even if he gave consent to enter and examine the carpet, the police exceeded the scope of that consent by engaging in a general exploratory search of the residence.

Buck testified that upon entering he noticed part of the carpet was discolored. According to Buck, the stained part of the carpet was a blanched white in comparison with the off-white color of the remainder. The stained area was approximately two to three feet in width and five feet long. The stained area was depressed, damp and noticeably different from the rest of the carpet. The stained area also smelled strongly of a cleaning solvent or bleach.

Buck took fiber samples from the rust-colored spots because these fibers had the appearance of having blood on them. Buck placed the fibers in a paper bag he found lying on a counter inside the house. Buck also noticed a vacuum cleaner lying on its

side in an adjacent room. From examining the carpet, Buck believed it had been recently vacuumed. He then examined the vacuum cleaner, once again noticing the smell of the cleaning solvent. Buck unzipped the vacuum and seized the vacuum cleaner bag.

The evidence at the hearing indicates Buck was in defendant's house for approximately two hours. He made and received several phone calls, and at one point requested additional officers be dispatched to the residence. One of the responding officer took photographs of the stained area.

Kim showed Buck where the garage was located and pointed out the victim's vehicle was missing. The officer was also shown a purse belonging to the victim. While in the residence, Buck checked the laundry area where he discovered bleach, gloves and other items which Buck testified would be commonly found therein.

Defendant claims Buck made a general exploratory search of the garage, laundry area, and other places inside the house and his search thus exceeded the scope of any consent given by defendant. Defendant also argues that as the search warrant issued the following day was based in part on the items Buck seized during his exploratory search, those items seized pursuant to the search warrant must also be suppressed.

The point missed by defendant is that the only items seized by Buck during his November 3 entry were properly seized because they were within the scope of defendant's consent. Buck seized fibers from the carpet as well as the bag from the vacuum cleaner apparently used to vacuum the carpet all of which were in the plain view of the officer. (See *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 10.) These were the *only* items seized during Buck's search. No other observations by Buck in the residence disclosed evidence

unfavorable to defendant or formed the basis for the search warrant which was subsequently issued.

Because the search warrant was based only on items properly and legally seized during Buck's consent search of the residence, defendant's claim the officer's search exceed the scope of his consent is unavailing.[4/]

III

Defendant argues the trial court erred in admitting into evidence Jiang's testimony of statements defendant made to her concerning his marital problems and his desire to have his wife killed. Although we find no merit in defendant's argument, a detailed explanation is required.

Prior to trial, defendant moved *in limine* to suppress statements made by Jiang to the police with regard to an earlier

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[4/] In light of determination on the issue of consent, defendant's remaining arguments relating to the search need not be considered.

conversation she had with defendant wherein defendant spoke of his marital problems and his desire to have his wife killed.

The record reflects Jiang met with Sacramento Police Detective Lee approximately two days after the victim was reported missing. During that conversation, Jiang informed Lee that she had no information concerning the victim's disappearance.

Jiang later met with her friend Irene Wang. Wang reminded Jiang of an earlier conversation between them wherein Jiang related statements made by the defendant regarding his marital problems and his desire to have his wife killed.

Following her conversation with Wang, Jiang and her attorney arranged to speak again with Detective Lee. The interview was conducted on November 15, 1991 (the November 15 interview). During that interview, Jiang informed Lee of her recent conversation with Wang. Jiang then told Lee of statements

defendant had made with regard to his marital problems and his desire to have his wife killed. According to Jiang, defendant said that someone had told him that he could have his wife killed. Defendant mentioned having driven to a location to meet this person, but said he became scared and decided not to leave his vehicle.

At the *in limine* hearing, Jiang testified that what she told Lee during the November 15 interview was simply what she had been reminded of by Wang. Jiang testified that she had no independent recollection of defendant having made any statements to her regarding his marital problems or a desire to have his wife killed, or even that she had a conversation with Wang wherein Jiang repeated these statements.

The trial court asked Jiang whether her testimony was that she did not make the statements to Wang or that she was unable to recall making such statements to Wang. Jiang

answered she did not know what she told Wang, but that she did not think she had any such conversation with Wang in which she repeated statements by defendant about wanting to kill his wife.

In ruling on the *in limine* motion, the trial court found Jiang's testimony at the hearing inconsistent with what she had told Lee as reflected in the transcript of the November 15 interview. In the court's view, the transcript of the November 15 interview indicated that Jiang was relaying to officer Lee her *own* conversation with defendant and not simply what she had been reminded of by Wang.[5/] The court further noted that it did not believe Jiang's *in limine* testimony that she had no recollection of any such conversation with defendant. (Cf. *People* v. *Peterson* (1972) 23 Cal.3d 883, 892 [Trial

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[5/] Defendant's trial counsel concurred in the court's assessment of Jiang's statements to Lee.

court is entitled to doubt the genuineness of a claim of memory lapse].)

The trial court concluded the statements made by defendant to Jiang constituted unambiguous statements against his penal interest and thus were not barred by the hearsay rule. (Evid. Code, § 1230.) The court further concluded that if Jiang were to testify at trial consistent with her *in limine* testimony, the People would be allowed to impeach her with the statements she made to Lee during the November 15 interview. The basis for this ruling was that Jiang's interview statements constituted prior inconsistent statements and thus were not barred by the hearsay rule. (Evid. Code, § 1235.) The trial court's rulings were clearly correct. (See *People* v. *Earnest* (1975) 53 Cal.App.3d 734, 741-743 [Multiple hearsay consisting of a prior inconsistent statement and an admission of the defendant properly received into evidence]; see also *People* v.

Zapien (1993) 4 Cal.4th 929, 952-953.) In so ruling, the trial court evaluated the trustworthiness of the statements in balancing prejudice against probative value. (Evid. Code § 352.) The court concluded the probative value of the statements made by defendant outweighed any prejudicial effect because the statements demonstrated circumstantial evidence of premeditation.

Subsequently, Jiang testified at trial that defendant never told her he wanted to kill his wife or that a few years earlier he had taken steps in that direction. She further testified that what she told Lee at the November 15 interview was only what Wang had told Jiang that Jiang had said on a previous occasion. In light of the trial court's previous ruling, the People were allowed to impeach Jiang with some of the

statements she made to Lee during the November 15 interview.[5/]

Defendant argues that if one considers the entire November 15 interview, and not various parts taken out of context, the only conclusion that can be drawn is that Jiang is relating to Lee what Jiang had been told by

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[5/] Among those statements were the following:

"[JIANG]: I remember something [defendant] use to tell me. [Defendant] wants, you know, he, and uh [defendant], you know wants to kill his wife . . . .

"Between [defendant] and his wife and uh his wife is a very, a person -- a person is very strong opinion, yell to him and whatever, and uh [defendant] talk to a guy or whatever and the guy said he could kill . . . her . . . .

"Yes, easy to kill her, you know. And then -- I don't exactly remember between this part and the next. I remember he told me . . . and uh [defendant] went there and he was so shaking, he was shaking and he could not get out of the car, and then after while he get a cool down and just drive back. That the only thing I can remember . . .

"[Defendant] [g]ot nervous and did not get out of the car, and he drive back and then he decide to divorce."

Wang. Thus defendant urges that the November 15 interview did not reflect Jiang's independent recollection of statements made to her by defendant, but was simply an effort by Jiang to inform Lee of those remarks of which Jiang had been reminded by Wang.

The trial court carefully reviewed the transcript of the November 15 interview. At the *in limine* hearing Jiang reviewed the transcript and conceded it was accurate. Defense counsel likewise conceded the transcript was accurate. The trial court concluded the statements made by Jiang at the November 15 interview were not simply based on what Wang had told Jiang that Jiang had said at some previous time, but instead constituted Jiang's independent recollection of her conversation with defendant.

We have reviewed the tape and the transcript and we believe they support the trial court's determination. Accordingly, that part of the interview in which Jiang

informed Lee of defendant's statements about his marital problems and his efforts toward having his wife killed was properly admitted to impeach Jiang after she testified she had no recollection of any such statements. (People v. Earnest, supra, 53 Cal.App.3d at pp. 741-743.)

Defendant argues the admission of Jiang's prior inconsistent statements violated his right of confrontation. Specifically, defendant argues he was unable to cross-examine Jiang about what she told Lee at the November 15 interview because at trial Jiang never acknowledged defendant had made any such statements.

"The receipt in evidence of a prior inconsistent statement does not violate the confrontation clauses of the federal and state Constitutions where the declarant testifies at trial and is subject to cross-examination. [Citations.]" (*People* v. *Zapien*, supra, 4 Cal.4th at p. 955.)

At trial, Jiang testified defendant never told her he wanted to have his wife killed or that he had taken any steps to accomplish that goal. She further testified that what she said to Lee during the November 15 interview was only what Wang told Jiang she had said on a previous occasion. On both direct and cross-examination, Jiang did not refuse to answer any questions about her out-of-court statements. Nor did she claim not to have any recollection of her statements to Lee. In fact, Jiang attempted to explain the apparent inconsistency in what she told Lee at the November 15 interview and her subsequent trial testimony.

This is not a case where the witness credibly convinced the trial court she did not have an independent recollection of the statements at issue. (See generally *California* v. *Green* (1970) 399 U.S. 149, 168-169 and fn. 18 [26 L.Ed. 489, 502-503 and fn. 18].) This likewise is not a case where the

witness refused to answer any questions, thus stonewalling effective cross-examination. (Cf. *People* v. *Rios* (1985) 163 Cal.App.3d 852, 860-861, 862-864.)

Here, the jury was presented with a witness who attempted to explain the inconsistency between her in-court testimony and her previous out-of-court statements. The weight to be afforded such testimony was for the jury to determine. (*People* v. *Zapien*, supra, 4 Cal.4th at p. 956; *People* v. *Barnes* (1986) 42 Cal.3d 284, 303-304.) Defendant's trial right were fully protected. (Cf. *People* v. *Rios*, supra, 163 Cal.App.3d at p. 865.)

IV

Defendant's final claim is of instructional error. Defendant argues the trial court erred in refusing to give his modified version of CALJIC No. 2.03. It was given in its standard form in relevant part as follows: "If you find that before this trial the defendant made a willfully false or

deliberately misleading statement concerning the crime for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination."

Defendant requested the trial court modify CALJIC No. 2.03 by adding the following language to the instruction: "Before considering the defendant's statements, you [must] determine the existence of the following preliminary facts.

"1. Whether the defendant made the statement; and

"2. Whether the defendant deliberately lied to hide his complicity in the crime.

"3. Unless you find both of these preliminary facts to exist, you must disregard the statement.

"The defendant's consciousness of guilt, if any, is relevant upon the questions of whether the defendant was afraid of being apprehended and whether the defendant thought he had committed a crime. Consciousness of guilt may not be considered in determining the degree of guilt or in determining which of the charged offense the defendant committed."

Defendant argues the trial court erred in refusing his modified instruction because Evidence Code section 403, subdivision (c)(1), gives him the statutory right to include the additional language he proposed.[2/]

[2/] Evidence Code section 403 provides in relevant part: "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact; [¶] (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony; [¶] (3) The preliminary fact is the

Defendant's claim fails for numerous reasons. First, and dispositively, Evidence Code section 403 applies only when the preliminary fact is "disputed." (Evid. Code, § 402, subd. (a).[8/] Defendant's statements were received in

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authenticity of a writing; [¶] (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself . . . [¶] (c) If the court admits the proffered evidence under this section, the court: [¶] (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist. [¶] (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists."

[8/] Evidence Code section 402 provides: "(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article. [¶] (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any

evidence without objection or dispute as to the existence or not of a preliminary fact. Thus, defendant's statements were not admitted by the court "under this section" 403. In fact there was no evidence at trial disputing the "preliminary fact" whether defendant made the statements ascribed to him. Second, in his opening brief defendant does not specify to which of his statements the modification of CALJIC No. 2.03 is applicable. He claims only that his pretrial statements were innocent whereas the People argue they showed a consciousness of guilt.[2/] In light of defendant's failure to specify those

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party so requests. [¶] (c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute."

[2/] In his reply brief, defendant states only that Evidence Code section 403, subdivision (c) (1) "applies to the multitude of statements that [defendant] purportedly made to the prosecution witnesses that the prosecutor argued manifested [defendant's] reluctance to search for his wife and thereby demonstrated a consciousness of guilt."

statements as to which he asserts the modified instruction would have been applicable, we are unable to resolve this claim. Third, defendant's proposed modification is argumentative and incorrectly states the law. For example, defendant's modification would substitute for the phrase "deliberately misleading," the phrase "deliberately lied." But the rule stated in CALJIC No. 2.03 applies both to statements that are willfully false and deliberately misleading. (*People* v. *Breaux* (1991) 1 Cal.4th 281, 303.)

Finally, we find ourselves in complete agreement with the trial court that CALJIC No. 2.03 did not require any modification, let alone the proposed modification, in order for it to be understandable to the jury. Accordingly, the trial court did not err in refusing defendant's instruction request.

Defendant also argues the trial court erred in refusing his request the court give a modified version of CALJIC No. 2.06. Instead,

the court gave the instruction in its unmodified form which states in relevant part: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration."

Defendant proposed modifying this instruction to read as follows: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by attempting to clean the stain off the carpet, such attempt may be considered by you as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

"The defendant's consciousness of guilt, if any, is relevant upon the questions of whether the defendant was afraid of being [apprehended] and whether the defendant thought he had committed a crime. Consciousness of guilt may not be considered in determining the degree of defendant's guilt or when determining which of the charged offense the defendant committed."

Defendant concedes his proposed modification with regard to direct mention of the carpet stain might be considered argumentative. Defendant claims, however, the trial court erred in not giving the second paragraph of his proposed instruction. He argues that even if the jury found he suppressed evidence, thus showing a consciousness of guilt at having committed the crime, such consciousness of guilt would have no legal significance with regard to his state of mind at the time he committed the crime.

The point ignored by defendant is that CALJIC No. 2.06, in its standard form, does not focus on defendant's state of mind at the time of the offense. (*People* v. *Breaux*, *supra*, 1 Cal.4th at p. 304.) The same is true for CALJIC No. 2.03. (Ibid.) "We addressed the same two instructions and rejected the identical due process argument in *People* v. *Crandell* (1988) 46 Cal.3d 833 []: 'The instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense. The instructions *do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto.*' (*Id.* at p. 871, italics

added; see also *People* v. *Nicolaus* (1991) 54 Cal.3d 551, 579-580 [].)" (*Ibid.*)

Since CALJIC No. 2.06 does not address a defendant's state of mind at the time of the charged offense, the trial court did not err in refusing to give defendant's modified instruction.

V

Defendant challenges the constitutionality of the reasonable doubt instruction, CALJIC No. 2.90, premising his argument on the grant of certiorari by the United States Supreme Court in *Sandoval* v. *California*, Dock. No. 92-9049. On March 22, 1994, the high court held that CALJIC No. 2.90, taken as a whole, correctly conveyed the concept of reasonable doubt and consequently there was no reasonable likelihood that the jurors understood the instruction to allow a conviction on proof insufficient to meet the standards set in In re Winship (1970) 397 U.S. 358. (*Victor* v. *Nebraska* (Mar. 22, 1994) ___

U.S. ___ [62 U.S.L.Week 4179].) In the words of the court, "in the context of the instructions as a whole we cannot say that the use of the phrase ['moral certainty'] rendered the instructions given in Sandoval's case unconstitutional." (Id. at p. ___ [62 U.S.L.Week at p. 4183.)

The judgment is affirmed.

Puglia, P.J.

We Concur:

Sparks, J.

Sims, J.

Order Issued By the California Supreme Court In *People* v. *Ray*, S049267 Dated July 27, 1994

Appellant's petition for review DENIED.

Lucas, Chief Justice

United States Constitution
Amendment IV

The right of the people to be secure in their persons, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the

right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United

States, or as a member of any state legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

California Evidence Code
Section 352

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

California Evidence Code
Section 1235

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

California Penal Code
Section 187

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.